Cardox Division of Chemetron Corporation *and* Teamsters Union Local No. 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 4-CA-10695

1 December 1983

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 30 September 1981 the National Labor Relations Board issued its Decision and Order in this proceeding,[1] in which it reversed the administrative law judge's finding that the Respondent did not violate Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union. Upon a petition for enforcement of the Board's Order, the United States Court of Appeals for the Third Circuit denied enforcement of the Board's Order and remanded the case to the Board for further consideration consistent with its opinion.[2] The Board thereafter accepted the court's remand and notified the parties that they could file statements of position with the Board on remand. The General Counsel and the Respondent have filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In order to place the substance of the court's remand in proper perspective, we note the following facts: the Respondent manufactures, sells, and distributes carbon dioxide and maintains 40 distribution depots. The instant controversy concerns the depots in its "Eastern Region." The Company has four servicemen in the eastern region. One serviceman is assigned to the metropolitan New York area and part of Connecticut and another to upstate New York and most of New England. Serviceman James Hurley services eastern Pennsylvania, southern New York, and all of Delaware. Serviceman James Pennington services all of Virginia and Maryland and the southern area of Pennsylvania around York. The servicemen work primarily out of their respective homes and all four eastern region servicemen are supervised by Bernard O'Reilly who is located in Newark. As of August 1979, Hurley and Pennington had certain regular contact with the Delaware City, Delaware depot which included occasionally receiving phone messages there, using the facility's credit for purchasing parts and tools, and visiting the facility periodically to pick up invoices or parts and to help straighten the parts room.

In June and July 1979, respectively, Pennington and Hurley signed cards authorizing the Union to represent them for collective-bargaining purposes. In August, the Respondent voluntarily executed a recognitional agreement with the Union covering field servicemen at the Respondent's Delaware City depot. The Respondent complied with an information request by the Union, and the parties held their first negotiating session on 17 October 1979. They failed to reach an agreement and later scheduled another bargaining session for 5 December 1979.

In November, Pennington notified O'Reilly that he no longer wished to be represented by the Union assertedly because a dispute had arisen over whether he should continue working during a strike by other employees represented by a different local of the same union at the Delaware City depot. At or about this time Pennington began receiving his calls at the Respondent's Suffolk, Virginia depot rather than Delaware City and essentially ceased other contracts with Delaware City. When O'Reilly informed Hurley of Pennington's decision, Hurley also decided he no longer wished to be represented by the Union. Subsequently, the Respondent canceled the bargaining session scheduled for 5 December. On 6 December, the Respondent's director of employee relations wrote a letter to the Union stating that only one employee, Hurley, still worked in the Union's jurisdictional area and thus "there does not seem to be any reason to cover him under a Local 115 agreement." The Respondent did not resume bargaining with the Union. The charge herein was filed on 12 December 1979, alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union.

In the earlier proceeding, the administrative law judge recommended that the complaint be dismissed in its entirety because the agreed-upon bargaining unit was inappropriate since it did not include all four servicemen in the Respondent's eastern region. Upon exception to the judge's decision, the Board reversed the judge and found that the company had violated Section 8(a)(5) and (1) of the Act. In this regard, the Board concluded that since the Respondent had voluntarily recognized and bargained with the Union it was unnecessary to decide whether the unit was appropriate. The Board went on to find that since a reasonable time for bargaining had not expired the Union continued to enjoy an irrebuttable presumption of majority status and thus the Respondent unlawfully withdrew recognition.

[1] 258 NLRB 1202.

[2] *NLRB v. Cardox Division of Chemetron*, 699 F.2d 148 (3d Cir. 1983).

On review the Third Circuit held the Board had erred in failing, under Section 9(b) of the Act, to determine whether or not the unit agreed upon by the parties is consistent with the National Labor Relations Act and past Board policy. Absent such a finding, the court held that the Board lacked the statutory power to hold that the Company's withdrawal of recognition violated the Act. Additionally, with regard to the unit issue, the court found that both the question of community of interest, relied on by the administrative law judge, and the question of a one-person unit had been properly raised to the Board by the Respondent.

Having accepted the remand, the Board also accepts the court's opinion as the law of the case. Accordingly, we shall consider the evidence relevant to the appropriateness of the agreed-upon unit. In this regard, as noted above, the servicemen work primarily out of their homes. Their job requires limited contact, however with one of the Respondent's depots. At the time of the initial recognition herein both Hurley and Pennington were attached to the Delaware City depot. This resulted in occasional contact between them and constituted the basis for the scope of the recognized unit. In November 1979, Pennington's depot functions were transferred to the Suffolk depot. Accordingly, the Delaware City unit was reduced to a single-person unit prior to Respondent's withdrawal of recognition.[3] Thus, pursuant to the remand of the court, we find that since the Board will not require an employer to bargain in a unit consisting of only one employee,[4] the Respondent's withdrawal of recognition was not unlawful. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The National Labor Relations Board hereby orders that its prior Decision and Order in this case be revoked and the complaint be dismissed.

---

[3] Counsel for the General Counsel concedes that, at least subsequent to the hearing, the bargaining unit was permanently reduced to a single-person unit rendering a bargaining order inappropriate.

[4] See, e.g., *Stern Made Dress Co.*, 218 NLRB 372 (1975).